

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
April 15, 2009 Session

**CYNTHIA LEE ZIMMERMAN v. RICHARD LANCE ZIMMERMAN**

**Appeal from the Chancery Court for Williamson County  
No. 31967 Timothy L. Easter, Judge**

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**No. M2008-01722-COA-R3-CV - Filed June 9, 2009**

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The husband fled the state without making any provisions for his wife's support. She filed a petition for legal separation and asked the trial court for permission to sell the marital home to pay her living expenses. After the home was sold, the trial court allowed the wife to use half the net proceeds for support and placed the other half in escrow. Both parties subsequently filed for divorce. After a hearing at which the court declined to consider awarding alimony to the wife because of procedural reasons, the court declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129(b). The court divided the remaining funds from the sale of the marital home between the parties, giving most of the money to the husband in the belief that wife's earlier receipt of proceeds from the home amounted to an earlier division of marital property in the wife's favor. The wife argues on appeal that she was entitled to a greater share of the remainder because the first half of the proceeds was actually awarded to her as a form of support and was used for that purpose, and thus that the funds previously escrowed constituted the only marital property within the court's power to divide. We agree, and we amend the trial court's division of marital property, but we affirm its decision not to award alimony to the wife.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Affirmed as Modified**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Judy A. Oxford, Franklin, Tennessee, for the appellant, Cynthia Lee Zimmerman, appellant.

Stephen Walker Pate, Murfreesboro, Tennessee, for the appellee, Richard Lance Zimmerman.

## OPINION

### I. A COMPLAINT FOR LEGAL SEPARATION

Richard Zimmerman (“Husband”) and Cynthia Zimmerman (“Wife”) were married for about twenty years. They are the parents of twin sons, who were born on January 15, 1988. One of the twins, Robert Zimmerman, got into trouble with the law while still a minor. On July 20, 2005, the Juvenile Court of Williamson County sentenced him to 25 days in the juvenile detention center, with the sentence to begin immediately. The court also ordered that upon the completion of his sentence his parents were to transport him to the Teen Challenge Program in Florida, which is apparently some kind of boot camp.

On August 13, 2005, Husband picked Robert up from custody and fled the state with him, leaving no forwarding address.<sup>1</sup> Husband’s absence left Wife in a quandary. Husband had been the family’s primary breadwinner, and Wife was left to support herself and her other son without the benefit of his income. Her expenses included the mortgage on the marital home in which the parties had lived for seven years. About two weeks after Husband left, Wife moved with her remaining twin son to Florida, to live with her own mother.

On October 18, 2005, Wife Filed a Complaint for Legal Separation in the Chancery Court of Williamson County on the ground of irreconcilable differences. On the same date, she filed a motion for an emergency hearing on her request to be allowed her to sell the marital home. Wife asserted that Husband was not furnishing her with any support, that she needed the help of her church to pay the October mortgage, and that she was not able to make future payments. Wife further asserted that in order to preserve the equity in the house, she would have to sell it prior to foreclosure and that she needed the equity from the house in order to support herself and her child.

The trial court granted Wife’s motion to sell the house on the following day and authorized her to sign all the necessary documents on her own behalf and that of Husband. Judge Davies declared that “upon the sale of the residence, Cynthia Lee Zimmerman shall have the authority to use one-half (1/2) of the equity from the sale of the parties’ residence to pay for living expenses and bills for herself and the parties’ minor child, Richard Zimmerman, with one-half (1/2) of the equity being placed with the Clerk and Master pending a final hearing.” The house was sold, with the closing occurring on December 16, 2005. The net proceeds amounted to about \$76,550. Wife spent down her half of the proceeds during the nearly three years while the parties continued to move towards a final resolution of this case.

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<sup>1</sup>The Juvenile Court promptly began contempt proceedings against Husband and found him in contempt for violating a direct order of the court. When he returned to Tennessee in February of 2007, he was arrested and sentenced to ten days in jail.

The proof showed that Husband telephoned Wife several times after he left Tennessee and told her that she was on her own because he could not help her financially. Wife knew that Husband was in Michigan, but she did not have his address. Service of Wife's separation complaint had been attempted at Husband's last known address in Franklin, but he could not be served and failed to answer Wife's complaint. She accordingly sought and obtained the court's permission to serve him by publication. After publication for four consecutive weeks in the Williamson A.M. section of the Tennessean newspaper, Wife moved for a default judgment on her separation complaint. Judge Heldman conducted a hearing on the motion on June 27, 2006. The court granted wife a divorce on the grounds of inappropriate marital conduct and abandonment, and awarded her the remaining proceeds from the sale of the home as alimony *in solido* as well as \$1,000 per month as alimony *in futuro*.<sup>2</sup>

Husband, who remained in Michigan, learned about the judgment and filed a motion through his attorney to set aside the divorce. He noted that Wife's complaint had asked for legal separation, not for divorce, and that she had not alleged any grounds in the complaint other than irreconcilable differences. *See Stephenson v. Stephenson*, 298 S.W.2d 717 (Tenn. 1957) (absolute divorce should not be decreed in separate maintenance suit in which no ground for divorce is pleaded). He also claimed that defects in service deprived him of proper notice and due process.

Prior to the hearing on Husband's motion, the parties reached agreement on the issues raised by that motion. In accordance with their agreement Judge Davies entered an agreed order setting the divorce decree aside, declaring it void *ab initio*, and suspending litigation to allow the parties to attempt to reconcile. The agreed order did not mention the money that the court had awarded to Wife.

## II. COMPLAINTS FOR DIVORCE

Unfortunately, the parties were unable to achieve reconciliation. On July 30, 2007, Husband filed an answer to Wife's petition for legal separation, which included a counterclaim for divorce on the basis of irreconcilable differences and inappropriate marital conduct. On October 17, 2007, Wife filed an "Amended Complaint for Divorce," which also included allegations of irreconcilable differences and inappropriate marital conduct. Some sections of Wife's complaint were identical to those in her earlier Complaint for Separation, including language asking the court for permission to sell the marital home and explaining why such a sale was necessary, even though it had already been sold almost two years earlier.

The amended complaint was not signed by Wife's attorney, and it lacked her verification. Under Tenn. Code Ann. § 36-4-107(a), every divorce petition other than one seeking divorce on the ground of irreconcilable differences must be verified by the sworn affidavit of the complaining party

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<sup>2</sup>The record shows that three different judges of Williamson County Chancery Court presided over the various hearings in this case.

“that the facts stated in the pleading are true to the best of the complainant’s knowledge and belief for the causes mentioned in the bill.”

On November 1, 2007, Husband moved the court to dismiss wife’s amended complaint, arguing that the lack of verification rendered that complaint void.<sup>3</sup> Wife did not respond to Husband’s motion until June 11, 2008, just a few days before the final hearing, when she filed a motion to be allowed to file a second amended complaint with proper verification. Her motion was accompanied by the affidavit of her attorney, attesting that his signature and Wife’s verification had been inadvertently omitted from the complaint, “due to a clerical error.”

### **III. THE FINAL DIVORCE HEARING**

The final divorce hearing was conducted on June 17, 2008 before Judge Easter. As a preliminary matter, counsel for Husband contended that the court lacked the jurisdiction to grant Wife any relief on the basis of her pleadings. He argued that the complaint for separation was not before the court since separation was no longer at issue, that her amended complaint for divorce was ineffective because of the lack of verification, and that it was simply too late to correct the complaint on the morning of trial.

Husband accordingly asserted that the only pleading legitimately before the court was Husband’s counterclaim for divorce and for an equitable division of the marital property. For her part, Wife argued that the lack of verification was merely a clerical error, which the court could readily fix by granting her motion to amend. The practical significance of Husband’s procedural argument, if accepted by the court, would be to limit Wife’s alimony rights.

The parties acknowledged that they were in substantial agreement about the need for a divorce as well as about the division of all the marital property other than the proceeds from the sale of the marital home. The children had reached their majority by then, so there was no question of a parenting plan or child support. Thus, the only remaining disputes involved the funds from the marital home and the possibility of alimony. Husband had not raised the question of alimony in his own complaint, and he hoped that by trying the case on that complaint alone, he could exclude from the court’s deliberations any consideration of alimony for Wife.<sup>4</sup>

After listening to argument from both sides, the court offered Wife a choice: she could either move for a continuance to give the parties a full opportunity to research the legal propriety and implications of a post facto verification of a divorce complaint, or the case could be tried immediately on Husband’s complaint alone, without any consideration of alimony. Wife’s attorney

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<sup>3</sup>Husband waived any objection to the absence of the attorney’s signature.

<sup>4</sup>Contrary to statements made during oral argument, Wife did not use the words “alimony” or “spousal support” in her complaints for divorce. Rather, she asked for divorce, division of marital property, attorney fees, court costs, discretionary costs and “. . . such further, other, different or general relief as to which the Wife may be deemed entitled.”

was allowed to confer with his client. After a ten minute discussion, she agreed to go ahead with the hearing.

Both parties were present at the hearing and both testified, as did Wife's mother. The proof showed that both parties had worked full-time throughout entire course of their marriage, but that they usually lived from paycheck to paycheck. They had not accumulated much marital property aside from the marital home. Husband usually earned more than Wife. His Social Security statement showed that he usually earned between \$30,000 and \$40,000 per year, while Wife usually earned between \$10,000 and \$15,000. Wife testified that at the time Husband left she was clearing about \$400 every two weeks from her job.

Wife testified that she did not know ahead of time that Husband planned to leave the state, and that his unexplained departure left her in a panic. She didn't realize what he had done until he called her nine days later. There was only \$5,800 of marital funds in the parties' bank account at the time. Some of that money was already pledged for an ongoing project to replace carpets in the house. During one telephone conversation, Wife asked Husband to help her pay for the premiums on his life insurance policy, but he said he could not help. Wife managed to pay the premiums on her own. The mortgage payment was \$1,238 per month and utilities also had to be paid each month, even after Wife moved to Florida. Needless to say, the money in the account was gone within a few months, and Wife needed the help of her church to pay the October mortgage

Wife testified that Husband did not make any suggestions to her as to how she could get the most money out of the sale of the house. When the house was sold in December of 2005, Wife received an immediate infusion of over \$38,000. She used some of the money to pay bills, including her moving costs. She went to nursing school while she was in Florida, and obtained a nursing certificate. At the time of trial she was working at a job that generated \$2,119 per month before taxes. Under cross-examination she acknowledged that she had sold the family's minivan and bought a Chrysler Sebring convertible for \$13,000 and bought a car for her eighteen year old son at a cost of \$4,500.

Husband was questioned about his life after leaving Wife. He testified that he has some family in Michigan, but that he is living alone in a rented apartment and is working at a job installing office furniture, which pays \$15 per hour.<sup>5</sup> He asserted that he would have been willing to help Wife if he could, but he had no discretionary income and had to focus on supporting himself and his son. He did not disclose his address or his cell phone number to Wife before he returned to Tennessee because he feared arrest. Asked if he had made a bad decision when he abandoned his wife, his house and his other son, he stated that he still wanted to protect his son from being forced into a program he did not agree with, but "I wish I had that day back," so he could find other ways to resist the juvenile court's decision.

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<sup>5</sup>Both twins are apparently now staying with Wife in Florida.

The proof had shown that after July of 2006 when Judge Heldman awarded Wife the second half of the money from the sale of the marital home (\$39,399 including interest) she put the money into CDs. She began drawing upon the money at some point, and at the time of trial, about \$31,600 remained.<sup>6</sup> Closing arguments focused on the proper division of that money. Wife's attorney argued that she should be awarded the entire amount because Husband abandoned the house and that it did not go into foreclosure and the equity was preserved entirely due to Wife's efforts.

Husband's attorney argued that Wife was in a financially better position than Husband and that she spent a lot of the money from the sale of the home on non-essentials, like her Sebring convertible. He also pointed out that Wife retained an IRA in her own name with a value of about \$7,000, which was marital property because it was acquired during the course of the marriage. *See* Tenn. Code Ann. § 36-4-121(b)(1)(A). He did not request any part of the IRA, but asked the court to take its existence into account and to give him one-half or more of the remaining equity from the home.

The court ruled from the bench and declared the parties divorced under 36-4-129(b). The court then discussed the issue of marital property before it by referring to the marital home, and stating:

The court specifically finds that it is or was the marital property pursuant to the evidence before the court. And the issue for the Court to determine is what is an equitable distribution of the proceeds remaining from that property, which I understand to be \$31,600 and what, if any, amount of the original \$38,257 Mr. Zimmerman's entitled to as equitable distribution of his portion of that piece of marital property.

The court then turned to the factors set out in Tenn. Code Ann. § 36-4-121(c) to govern the equitable distribution of marital property and discussed each of them in order.<sup>7</sup> The court found that

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<sup>6</sup> It is unclear from the record whether Wife withdrew funds from the escrowed half of the proceeds before or after the trial court agreed to set aside the divorce arising from the default hearing of June 27, 2006.

<sup>7</sup> Tenn. Code Ann. § 36-4-121(c) reads,

In making equitable division of marital property, the court shall consider all relevant factors including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;

(continued...)

most of those factors, such as the parties' health, employability, earning capacity and financial needs were evenly balanced between the parties. But it found that one factor favoring Wife was her contribution to the preservation of the marital property at issue. *See* Tenn. Code Ann. § 36-4-121(c)(5). The court also found that Wife's expenses were reasonable.

The court accordingly announced that Wife "is entitled to more of the equity than just a 50/50 split." The court then declared that it was awarding Husband \$25,000 of the remaining proceeds, with Wife to keep the rest. The court's determination was memorialized in a Final Decree, dated July 3, 2008, which ordered Wife to transfer the sum of \$25,000 to Husband by mailing a check in that amount to his Michigan address. Wife appealed and filed a motion in the trial court to stay enforcement of the final decree pending the outcome of the appeal. The trial court granted the stay.

#### **IV. THE DIVISION OF MARITAL PROPERTY**

Wife argues on appeal that the division of the marital property ordered by the court was inequitable and that it was at odds with court's own declaration that she was entitled to "more of the equity than just a 50/50 split." She contends that the court's determination was based on an error of law in that the court obviously based its division on the total value of the equity in the marital home in 2005, at the time it was sold (\$76,515), rather than the funds remaining on the day of trial (\$31,600). We agree with Wife that the trial court should not have divided the property on the basis of the 2005 value of the equity in the marital home. The court's own statement from the bench does indeed indicate that the court based its calculation on the larger figure, and its final determination suggests that the court decided that Wife was entitled to roughly two-thirds of the marital property and Husband to one-third.

In actions for divorce or legal separation, Tennessee courts are required to make an equitable division of the marital property, without regard to fault. Tenn. Code Ann. § 36-4-121(a). While a trial court has a duty to divide marital property, it can only distribute the property that actually exists at the time of divorce. As this court has stated:

property once owned by a spouse, either as separate property or marital property, but not owned by either spouse at the time of divorce is not subject to classification and division or distribution when the divorce is pronounced. That is because, generally speaking, a court cannot divide and/or distribute what is 'not there'-property no longer owned by the parties, individually or jointly, at the time of the divorce."

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<sup>7</sup> (...continued)

(7) The estate of each party at the time of the marriage;

(8) The economic circumstances of each party at the time the division of property is to become effective;

(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;

(10) The amount of social security benefits available to each spouse; and

(11) Such other factors as are necessary to consider the equities between the parties.

*Brock v. Brock*, 941 S.W.2d 896, 900 (Tenn. Ct. App. 1996). See also *Franklin v. DeKlein Franklin*, No. E2007-00577-COA-R3-CV, 2008 WL 19091113 (Tenn. Ct. App. April 30, 2008) (no Tenn. R. App. P. 11 application filed).

In the present case, Husband fled the marital home, leaving Wife with full responsibility for all household expenses for herself and her child, including mortgage payments. Husband was out of state and could not be reached by service of process, and he told Wife that he was unable to offer her any financial assistance. Wife accordingly asked the court for permission to sell the marital home for her own support and that of her child. The trial judge gave her permission to sell the parties' most valuable marital asset and to apply one half of the proceeds ". . . to pay for living expenses and bills for herself and the parties' minor child . . ." The other half was placed in escrow, specifically for the purpose of property division.

Consequently, the \$38,000 originally awarded to Wife from the sale of the house no longer existed at the time of the final divorce hearing. We agree with the reasoning in *Brock* that a trial court cannot award a non-existent asset. Additionally, Tennessee Code Annotated § 36-4-121(b)(1)(A) provides that "[a]ll marital property shall be valued as of a date as near as possible to the date of entry of the order finally dividing the marital property." As of the date of the final order dividing the property, the value of the equity from the sold home was the money remaining at the time.

We are aware that Tennessee Code Annotated § 36-4-121(b)(1)(A) defines "marital property" as property "acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce . . ." While that provision could complicate issues in another situation, the fact is that in the case before us, the first complaint for divorce was filed by husband on July 30, 2007, as a counterclaim to Wife's original complaint for legal separation. The house had been sold, pursuant to court order, in December of 2005. Wife had been awarded half the proceeds from the sale for living expenses for herself and the parties' child remaining at home, and she spent that money. Consequently, at the time of the filing of the divorce complaint, neither party owned the house or the entire equity from the sale of the house.

It is important to recognize that, after Wife filed a complaint for legal separation, the trial court awarded her half the proceeds from the sale of the house as support for herself and her child, giving her "the authority to use one-half (1/2) of the equity from the sale of the parties' residence to pay for living expenses and bills for herself and the parties' minor child . . ." Upon the filing of a complaint for legal separation, a trial court may "provide for such matters as child custody, visitation, support and property issues during legal separation upon motion by either party . . ." Tenn. Code Ann. § 36-4-102(c). Additionally, in an action for divorce or legal separation, "[t]he court may, in its discretion, at any time pending the final hearing, upon motion and after notice and hearing, make any order that may be proper to compel a spouse to pay any sums necessary for the



support and maintenance of the other spouse . . . .” Tenn. Code Ann. § 36-5-121(b). If necessary such *pendente lite* support may be paid out of either spouse’s property. Tenn. Code Ann. § 36-5-121(a).

The wording of the trial court’s order of October 19, 2005, makes it clear that Wife was awarded one-half of the proceeds as support *pendente lite*, even though marital property was the source of the funds awarded. That order, in effect, reduced the marital estate by the amount awarded as support. Accordingly, we must conclude that the trial court erred by including in the calculation it used to reach an equitable division of the marital property the proceeds awarded to the Wife as a form of support and spent by her for that purpose.

Although we could remand this case to the trial court for another proceeding to determine an equitable division of the marital property, as identified in this opinion, the interest of judicial economy leads us to make our own calculations. In doing so, we will redefine the property subject to division and apply the trial court’s determination that Wife was “entitled to more of the equity than just a 50/50 split.” In its division of the property, the trial court awarded two-thirds to Wife and one-third to Husband, even though it used an incorrect amount for the value of the proceeds from the sale of the marital residence.

At the time the original divorce decree was entered in July of 2006, the remaining half of the equity in escrow was \$39,391. That decree awarded all the money remaining in escrow to Wife. Later, that decree was set aside in January of 2007. That is the value we attribute to the half of the equity subject to distribution.

We accordingly hold that the proper basis for the court to consider in its division of the equity in the marital home is \$39,391, the amount remaining in escrow at the time of the original decree. We will also include in our calculation Wife’s IRA, which was worth about \$7,000 at the time of the final hearing. Husband argued that the IRA was also marital property, and Wife did not dispute that fact. Adding \$7,000 to the \$39,391 equity derived from the sale of the marital home, we find that the parties had a total marital estate of \$46,391 subject to division at the time of divorce. One-third of that sum is \$15,464. We therefore modify the trial court’s previous order to direct Wife to send Husband a check for \$15,464 at his current address.

## **V. THE QUESTION OF ALIMONY**

In the present case, Husband challenged the lack of verification in Wife’s first complaint for divorce, which had been filed October 17, 2007, by filing a motion to dismiss on November 1, 2007. All divorce complaints, except those seeking divorce on the ground of irreconcilable differences, must include a verification, upon an oath or affirmation taken before specified officials, “that the facts stated in the bill are true to the best of the complainant’s knowledge and belief.” Tenn. Code Ann. § 36-4-107(a). Proper verification is a jurisdictional requirement, and in the absence of such verification, the court possesses no jurisdiction to hear the complaint. *DeArmond v. DeArmond*, 20

S.W.422 (Tenn. 1892); *McFerrin v. McFerrin*, 191 S.W.2d 946, 947-48 (Tenn. Ct. App. 1945); *Fuqua v. Fuqua*, No. 01A01-9403-DR-00143, 1994 WL 441041 (Tenn. Ct. App. Aug 17, 1994).

The final divorce hearing was not conducted until June 17, 2008. Even though the motion to dismiss had been filed seven months before, Wife waited until just a few days before the divorce hearing to file her motion to amend. Wife argues that the trial court erred in denying her motion to be allowed to amend her complaint on the day of trial by adding her verification to it. She contends that the court thereby eliminated any possibility that alimony could be awarded to her because there was no verified complaint before the court praying for such relief.

The transcript of the evidence shows that the trial court did not believe it appropriate to rule on Wife's motion to amend her complaint because of the absence of adequate briefing and argument on the legal effect of a post facto verification. The determination whether or not to grant a motion to amend a pleading lies within the sound discretion of the trial court. *Burton v. Carroll County*, 60 S.W.3d 821, 832 (Tenn. Ct. App. 2001); *State Dept. of Human Services v. Hauck*, 872 S.W.2d 916, 919 (Tenn. Ct. App. 1993); *Merriman v. Smith*, 599 S.W.2d 548 (Tenn. Ct. App. 1979). A trial court's discretionary ruling on amendments to pleadings will not be disturbed on appeal unless there is a showing of abuse of discretion. *George v. Building Materials Corp.*, 44 S.W.3d 481, 486 (Tenn. 2001); *Harris v. St. Mary's Medical Ctr., Inc.*, 726 S.W.2d 902, 904 (Tenn. 1987).

While a trial court's pre-trial discretion in dealing with amendment of pleadings has been substantially lessened by an amendment to Rule 15.01 of the Tennessee Rules of Civil Procedure, which provides that "leave shall be freely given when justice so requires," In *Branch v. Warren*, 527 S.W.2d 89, 91 (Tenn. 1975), that discretion has not been eliminated. In ruling on a motion to amend, a trial court should consider undue delay in filing, lack of notice to the opposing party, and undue prejudice to the opposing party. *Clark v. Service Corp. Int.*, 20 S.W.3d 665 (Tenn. Ct. App. 1999).

Despite Wife's arguments, however, it appears to us that the trial court did not deny her motion to amend. Concerned about the lack of time for briefing all the issues, the court gave Wife the choice of either accepting a continuance, so that her motion could be fully responded to, or proceeding to trial with the stipulation that the question of alimony would not be considered. Wife chose to go forward with the hearing. In other words, the trial court gave her the option of a continuance if she was determined to argue her motion. We do not believe the trial court abused its discretion in declining to immediately rule on Wife's motion to amend and offering a later hearing on the motion.

Represented by counsel, Wife chose not to accept the continuance. Thereby, she chose to proceed with the divorce hearing on husband's counterclaim and knowingly waived any consideration of alimony. The trial court proceeded in conformance with Wife's choice, and we will not hold a court in error in such a situation. Neither will this court consider an issue specifically waived by a party before the trial court.

## **VI.**

The trial court's division of property is modified as described in this opinion. Accordingly, the trial court's order requiring Wife to mail to Husband a check is modified to the amount of \$15,464. In all other respects, the order of the trial court is affirmed. We remand this case to the Chancery Court of Williamson County for any further proceedings necessary. Tax the costs on appeal equally between the appellant and the appellee.

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PATRICIA J. COTTRELL, P.J., M.S.